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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/937,931	01/08/2002	Marc Wasberg	2302.2060	8802
5514	7590	05/23/2006	EXAMINER	
FITZPATRICK CELLA HARPER & SCINTO 30 ROCKEFELLER PLAZA NEW YORK, NY 10112			BECKER, DREW E	
			ART UNIT	PAPER NUMBER
			1761	
DATE MAILED: 05/23/2006				

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>		<b>Applicant(s)</b>	
	09/937,931		WASBERG ET AL.	
	<b>Examiner</b>		<b>Art Unit</b>	
	Drew E. Becker		1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 09 November 2005.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-6,9,13,14,20,21 and 23-31 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-6,9,13,14,20,21 and 23-31 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 1-6, 9, 13-14, 20-21, and 23-31 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
3. Claims 1 and 23 recite "wherein the film has a layer... defining an outer face of the item and a layer... defining an inner face of the item". It is not clear whether the "film" or the "item" is being described. It is not clear whether the "at least one product" is a part of the "item".

### ***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 1-4, 9, 13-14, 20, 23, and 26-31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Haiss [Pat. No. 4,290,526] in view of Bowen [Pat. No. 3,909,582].

Haiss teaches an item comprising a product (Figure 2, #9), a flexible film enclosing the product and an amount of gas (Figure 1, #1), a precut line perpendicular to the longest

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side (Figure 1a, #3), opening the package by rupturing only the precut line (Figures 1-2), the bending inherently causing increased pressure and tensioning, a joining line (Figure 1, #4), the film having two superposed layers (column 2, lines 1-5), the use of polypropylene and polyethylene (column 2, lines 4-5), the product being chocolate or ice cream (column 1, line 10), and a lacquer lacking solvent (column 2, line 8). Phrases such as "bending the item" are merely preferred methods of using the claimed product. A claim containing a "recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus" if the prior art apparatus teaches all the structural limitations of the claim. Ex parte Masham, 2 USPQ2d 1647. MPEP 2114. Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985). Haiss does not recite an outer face of polypropylene, an inner face of polyethylene, and the precut line extending only through the polypropylene. Bowen teaches a food packaging film for frozen foods (column 1, line 16) comprising an outer face of polypropylene, an inner face of polyethylene, and a precut line extending only through the polypropylene (column 13, line 49 to column 14, line 41). It would have been obvious to one of ordinary skill in the art to incorporate the film of Bowen into the invention of Haiss since both are directed to frozen food packages, since Haiss already

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included a multi-layer film comprising polypropylene and polyethylene (column 2, line 4), and since Bowen teaches that this type of film was commonly used to package frozen foods (column 1, line 16).

6. Claims 5-6, 21, and 24-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Haiss, in view of Bowen, as applied above, and further in view of Jud [Pat. No. 4,658,963].

Haiss and Bowen teach the above mentioned components. Haiss and Bowen do not recite plural, similar sized products in the package. Jud teaches an item comprising a product (Figure 4, #5), a flexible film enclosing the product and an amount of gas (Figure 4, #1), a precut line perpendicular to the longest side (Figure 2, #3), opening the package by bending it to rupture only the precut line (Figures 4-5), the bending inherently causing increased pressure and tensioning, several products of equal size within the package (Figure 7), the precut line located adjacent two of the products (Figure 7, #28), the use of polypropylene (column 3, line 54), and the product being chocolate (column 3, line 2). It would have been obvious to one of ordinary skill in the art to incorporate the product configuration of Jud into the invention of Haiss, in view of Bowen, since all are directed to food packages, since Haiss already included a solid food product (Figure 1, #1), and since food packages commonly held plural food products as shown by Jud.

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7. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Wysocki [Pat. No. 3,451,539] and Sparks [Pat. No. 3,207,299] teach food packages which burst open.


***Response to Arguments***

8. Applicant's arguments with respect to claims 1-6, 9, 13-14, 20-21, and 23-31 have been considered but are moot in view of the new ground(s) of rejection.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Drew E. Becker whose telephone number is 571-272-1396. The examiner can normally be reached on Mon.-Fri. 8am to 4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
**DREW BECKER**  
**PRIMARY EXAMINER**

S-22-06